IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.208 OF 1988

Sulochana Babulal Sancketi ...Appellant

Vs.

Sushila Laxman Lokhande ...Respondent

Shri V.A.Thorat for the Appellants.

Shri R.G.Ketkar for Respondent.

CORAM:A.S.OKA, J.

DATED:26TH & 27TH JULY 2004.

ORAL JUDGMENT:

1. On 4th July 1988 this Court admitted the Second Appeal by observing that the ground Nos.3 and 4 in Memorandum of Appeal raise the substantial questions of law. The ground Nos.3 and 4 in Memorandum of Appeal read thus:

> (3) The Court below has totally failed to consider that Respondent agreed to give possession of one room to the Appellant before June, 1982 and the remaining portion at the time of execution of the sale deed. It is submitted that there was no rent fixed, and therefore, the said term clearly indicated that part performance was to be made by the Respondent. The learned Judge failed to consider that the Respondent tried to make out a false case that the said room

was to be given on rent and the amount of rent was to be adjusted towards the loan amount.

(4) The Court below has totally failed to consider that Respondent made out totally a false case and it was different from what was stated in the written statement. The Respondent in the written statement made out a case that the amount of Rs.15,000/- was paid as a loan and the document Exhibit 68 was more security, while in the evidence it was stated that the said amount was paid as advance towards the rent and it was to be adjusted. The Respondent ought to have disbelieved on account of this.

2. I have heard the Counsel appearing for the parties on the aforesaid substantial questions of law. For appreciating the submissions made by the learned Counsel for the parties, it will be necessary to refer the facts of the case in brief. The Appellant is the original Plaintiff and the Respondent is the original Defendant. The suit is filed by the Appellant against the Respondent for specific performance of agreement dated 19th May 1982 executed by the Respondent in favour of the Appellant in respect of the suit property described in paragraph No.1 of the plaint. The suit property is a house bearing Municipal House No.405 situated at Raviwar Peth, Nasik corresponding to City Survey No.574 admeasuring 33.4 sq.meters. The agreed consideration was Rs.23,000/-. The case of the Appellant is that a sum of Rs.15,000/- was paid by

the Appellant to the Respondent by way of earnest money. The case is that it was agreed that the possession of the entire suit property was to be given to the Appellant on the date of execution of the sale deed. However, one room admeasuring 17 X 22 ft. was to be handed over to the Appellant by the end of June 1982. The case of the Appellant is that he was always ready to perform his part of the agreement. When the Appellant demanded possession of one room on the ground floor in the suit property, the Respondent gave evasive reply and therefore notice dated 3rd July 1982 was issued by the Appellant to the Respondent. As the Respondent refused to perform his part of the suit agreement, a suit for specific performance was filed by the Appellant.

3. The suit was resisted by the Respondent by filing his written statement. A contention raised by the Respondent is that the transaction between the parties was a money lending transaction and the agreement for sale was executed as a security for repayment of loan which was advanced by the Appellant to the Respondent. A case is made out that the market value of the suit property was Rs.60,000/- in the year 1978 and in the year 1982 market value was Rs.1,50,000/- to Rs.2,00,000/-.

4. The Trial Court partly decreed the suit. The Trial Court refused to grant a decree for specific performance. However, the Trial Court directed the Respondent to pay to the Appellant damages to the tune of Rs.20,400/- with future interest on Rs.15,000/- at the rate of 10% p.a. from the date of decree till the realisation of the amount. The learned Trial Judge accepted the case made out by the Respondent that the real transaction between the parties was a loan transaction and the agreement was executed as a security for repayment of loan. The damages awarded by the Trial Court consisted of Rs.15,000/- by way of earnest money and Rs.5400/- being interest calculated on Rs.15,000/- from 18th May,1982 till the date of decree of the Trial Court.

5. An Appeal was preferred by the Appellant to the District Court. The said Appeal was dismissed by the Appellate Court. Therefore, this Second Appeal has been preferred by the Appellant.

6. The learned Counsel for the Appellant-Plaintiff contended that on plain reading of the suit agreement it was clear that it was an agreement for sale and it was not open for the Trial Court to permit the Respondent to lead any oral evidence to prove the

contents of the agreement in view of Sections 91 and 92 of Indian Evidence Act,1872 (hereinafter referred to as the said Act). The learned Counsel for the Appellant submitted that the bar under Sections 91 and 92 of the said Act was attracted and the Trial Court ought not to have permitted the Respondent to lead evidence contrary to the said provisions. The learned Counsel submitted that the Respondent consciously entered into agreement for sale. He pointed out that even as per the findings recorded by the Court below it is very clear that the Respondent was possessing sufficient funds. He submitted that considering the evidence on record, it cannot be accepted that the Respondent was required to borrow any amount. The learned Counsel for the Appellant submitted that the findings recorded by the Courts below are perverse and need interference under Section 100 of Code of Civil Procedure, 1908 (hereinafter referred to the said Code).

7. The learned Counsel for the Respondent submitted that there are concurrent findings of fact recorded by the Courts below. He submitted that the real nature of transaction is an issue of fact which has been decided by both the Courts below.

8. It is necessary to consider the findings of the

Appellate Court. The Appellate Court has accepted the case of the Respondent that the real nature of the transaction was loan and not an agreement for sale. The Appellate Court has considered the evidence and has come to the conclusion that essentially it was agreed between the parties that a sum of Rs.15,000/- will be advanced to the Respondent and by way of security, the agreement for sale was executed. The Appellate Court has considered one more circumstance. The suit agreement provides that by the end of June 1982 the Respondent was to hand over one room out of the suit property to the Appellant. By notice dated 3rd July 1982 the Appellant had not sought performance of the main terms of the agreement but has called upon the Respondent to deliver possession of one room. The Appellate Court has also considered the admission given by the Appellant that though the Appellant was a trader, he did not make enquiry regarding price of the suit property and prevailing market price. There is evidence on record to show that when the same property was mortgaged in favour of Nashik Peoples' Co-operative Bank, the valuation thereof was made at Rs.40,000/- to Rs.50,000/-. The Appellate Court has taken judicial notice to the fact that the suit property was situated in the heart of the town and in the year 1982 the market value cannot be only

Rs.23,000/-. The Appellate Court in paragraph 10 of the Judgment recorded a finding that the suit property was only house property possessed by the Respondent. The Appellate Court has referred to invitation card of the marriage of the daughters of the Respondent which took place in June 1982.

9. It is not really necessary to deal with the contention raised by the learned Counsel for the Appellant as regards applicability of Sections 91 and 92 of the said Act of 1872. In paragraph Nos.13 and 14 of the Judgment of the Appellate Court, by giving reasons, the Appellate Court has recorded a finding that the discretion under Section 20 of the Specific Relief Act, 1963 (hereinafter referred to the said Act of 1963) was required to be exercised in favour of the Respondent by refusing to grant specific performance. While recording the finding on the said point, the Appellate Court has considered thatthe Respondent's husband was getting a salary of only Rs.350/- p.m. after necessary deductions. The Appellate Court also referred to evidence on record which shows that market value of the suit property on the date of the suit Agreement was much more than the price mentioned in the Suit Agreement. The Appellate Court has also referred to the evidence of the Respondent's husband that if the suit property was

sold he will have no other shelter. He stated that he will not get any other accommodation at Nashik. It must be noted here that the location of the suit property, the consideration agreed to be paid and the fact that the Respondent was having only one property and the meagre income of the Respondent's husband are very relevant considerations for exercising discretion under Section 20 of the said Act of 1963. Even assuming that the real nature was transaction between the parties was the agreement for sale, when the Appellate Court has given reasons for recording the finding that the discretion under Section 20 of the said Act of 1963 cannot be exercised in favour of the Respondent, it cannot be said that the finding of the Appellate Court is perverse. The circumstances which are considered by the Appellate Court are very relevant in so far as the exercise of discretion under Section 20 of the said Act of 1963 is concerned. Unless it is shown that the said discretion is arbitrarily exercised or that it is exercised in disregard to the well settled principles, interference cannot be made under Section 100 of the said Code. As referred to earlier, the financial status of the parties and the fact that the Respondent was not having any other house property and the amount of consideration are the factors which are taken into consideration by the Court below for

exercising discretion. All these factors if considered together are sufficient to refuse the decree of specific performance. The cumulative effect of all these factors has been taken into consideration. Therefore, it is not possible to come to the conclusion that exercise of discretion by the Appellate Court is arbitrary.

10. In view of this position it is not necessary to go into the other question whether the suit Agreement was executed by way of security for repayment of loan. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

Judge.